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No. 247

Supreme Court of the United States

OCTOBER TERM, 1956

THE BRITISH TRANSPORT COMMISSION,
Petitioner,
v.
UNITED STATES OF AMERICA, as owner of the U.S.N.S. HAITI VICTORY, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE BRITISH TRANSPORT COMMISSION, PETITIONER

DEAN ACHESON
701 Union Trust Building
Washington, D. C.
EDWIN LONGCOPE
120 Broadway
New York 5, New York
Attorneys for Petitioner

COVINGTON & BURLING
HILL, BETTS & NASH
Of Counsel

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Both this Petition—No. 247—and the Petition for Certiorari filed by Arthur Goodman, et al. in No. 249 seek review of the same decision of the Court of Appeals for the Fourth Circuit (Pet. Appendix, p. 12, 230 F.2d 139). Petitioners in No. 249 were passengers aboard the British Transport Commission's vessel, the S.S. DUKE OF YORK. In substance, they join with us in seeking review of our second and third "Questions Presented" (Pet. p. 3), arising out of the exoneration by the court below of the U.S.N.S. HAITI VICTORY. They oppose, however, the granting of certiorari on our first Question—whether they, as other claimants in the HAITI VICTORY's limitation proceeding, may implead

the British Transport Commission under Admiralty Rule 56. The Government, Respondent in both No. 247 and No. 249, has filed briefs opposing the grant of certiorari on all issues in both cases.

The British Transport Commission respectfully urges that this Court should review all three Questions Presented by the decision below (Pet. pp. 2-3).

I

Both the Government's brief in opposition (pp. 10-15) and that filed by the passenger claimants oppose review by this Court of the question of the propriety of impleader of the Commission by other claimants in this limitation proceeding. Both briefs argue primarily the merits of the decision below on this question, and both of them confuse the admiralty practice with respect to cross-libels in ordinary suits *in rem* or *in personam* with the applicability of the third-party practice under Rule 56 to co-claimants in a limitation of liability proceeding.[1] At this stage, however, further discussion of this would not be profitable. For present purposes the simple answer to these arguments is that the decision below is in conflict with the decision of the

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[1] The brief for the passenger claimants erroneously refers to the question as involving a "cross-libel". In fact, the question is only one of the propriety under Admiralty Rule 56 of *an impleading petition by a co-claimant in a limitation proceeding.* It should also be noted that, since the Government—the limitation petitioner—never joined with the passenger claimants in filing impleading petitions against the Commission, it is not now properly before this Court on this issue. Its filing of a cross-libel in the District Court, following the decision below, presents a related but different question which has not yet been passed upon by either the District Court or the Court of Appeals, and is obviously not ripe for determination by this Court. See our Petition, pp. 15-17.

Fifth Circuit in *Department of Highways* v. *Jahncke Service*, 174 F.2d 894 (1949).

The Government in its brief in opposition here understandably, if weakly, tries to distinguish the *Jahncke* case. It argues (p. 14) that there the person attempted to be impleaded by a claimant in a limitation proceeding was not already a party to that proceeding, while here such person was also a claimant already in the proceeding. Neither the history nor the language of Rule 56, however, would support this distinction; in fact the specific provisions of the Rule make it plain that it was intended to be used ordinarily, if not primarily, to bring in third persons not already parties to the proceeding,[2] as was sought to be done in the *Jahncke* case. If the third party practice provided by Rule 56 is available to a claimant in a limitation proceeding to bring in a co-claimant (as the court below held), it must equally be available to him, upon proper service, to bring in a third party who may also be liable (contrary to the decision of the Court of Appeals for the Fifth Circuit). As the court said in the *Jahncke* case,

> ". . . a consideration of the origin, nature and purpose of a limitation of liability proceeding and of the origin, nature and extension of the third party practice under original Admiralty Rule 59, now Rule 56, leaves us in no doubt of the correctness of appellee's contention" (174 F.2d at 895).

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[2] After providing for the filing of a third party petition by the claimant of a vessel in a suit *in rem* or by the respondent in a suit *in personam*, it provides:

> "Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against . . ." (Pet. p. 4).

That the *Jahncke* case if followed would be determinative here was recognized by the District Court, which stated specifically that "the same principle there enforced governs here" (Pet. Appendix, p. 2). Circuit Judge Lumbard sitting in Admiralty in the Southern District of New York in *New Jersey Barging Corp.* v. *T. A. D. Jones Co.*, 135 F.Supp. 97, 99 (1955) similarly cited the *Jahncke* case as controlling in holding that a limitation petitioner may not implead *a claimant in that proceeding* under Rule 56. Furthermore, in the *Jahncke* case itself the Court of Appeals for the Fifth Circuit cited an earlier decision in the Southern District of New York similarly denying a limitation petitioner the right to implead *a claimant in that proceeding* (*Petition of Texas Co.*, 81 F.Supp. 758) as in accord with its decision (174 F.2d at 895). And, finally, the passenger claimants in their brief in opposition in this Court have tacitly recognized that the *Jahncke* case is squarely opposed to the decision below. In contending (erroneously, as we believe) that the filing of a claim in a limitation proceeding is the practical equivalent of the filing of a libel, they note that "the learned District Judge as well as the Court of Appeals for the Fifth Circuit on whom he relied, see *Department of Highways* v. *Jahncke Service*, 174 F.2d 894 (1949), failed to make this distinction."

Accordingly, it is submitted that the question of the proper interpretation of Admiralty Rule 56 should be reviewed by this Court in order to eliminate a clear conflict among the circuits on this important question of Admiralty practice.

II

The Government seeks to dispose of the serious questions of law arising out of the exoneration of the HAITI VICTORY by characterizing this as a mere decision of fact. While a determination of liability or exoneration in a collision case, like a determination of seaworthiness, may under some circumstances be essentially a finding of fact, not appropriate for review by this Court, it may in other cases present a genuine and important conclusion of law. *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 98-99. Here the decision exonerating the HAITI VICTORY on simple and undisputed findings of what happened, and when, presents important questions of maritime law in a new and increasingly vital area, and applies the International Regulations for Preventing Collisions at Sea inconsistently with their accepted application in other circuits.

Contrary to the Government's characterization, Petitioner here is not attempting to undercut the lower court's findings that the HAITI VICTORY had no reason actually to know of the existence of the nearby fog bank which hid the DUKE, nor does it follow from Petitioner's position that any ship at any place on the high seas must operate her radar whenever darkness falls. No such issue is presented on the findings here. Petitioner urges only that a ship equipped with fully operative radar, proceeding at high speed through what are known to be heavily traveled waters and at a crossroads of marine traffic, on a dark and overcast night with no horizon visible, must under the General Precautionary Rule (Article 29) take the minimal precau-

tion of periodically using her radar lookout in order to guard against unseen (and, by the human eye, unseeable) fog banks and approaching ships or other dangers hidden by them. Far from discounting the importance of full and proper utilization of radar, as suggested by the Government (p. 8, n. 3) the recent ANDREA DORIA disaster serves to underline the necessity for an authoritative determination by this Court of the responsibilities imposed upon the steadily increasing number of seagoing vessels equipped with this great anti-collision detection instrument.

III

The Government attempts to dispose summarily of the HAITI VICTORY's plain violation of the mandate of Article 16—that upon hearing a fog whistle forward of her beam a vessel shall at once stop her engines—by cavalierly disregarding and even misstating the concurrent findings of both lower courts. Thus, without giving the time the whistle was heard, the Government states (p 4) that the pilot "immediately (at approximately 4:15 a.m.) stopped the HAITI's engines". Even more seriously, it makes the extraordinary statement (at p. 9) that the HAITI's pilot "in stopping the vessel's engines within a matter of seconds after the whistle was heard" complied with Article 16.

The concurrent findings of the two courts below are as binding upon the Government as they are upon Petitioner. The District Court found that the HAITI's fog whistle was heard "just after 0414 hours" by both the lookout and the HAITI VICTORY's pilot. He stopped his engines at "0415 hours". The minute he wasted was spent in futilely gazing into the darkness, in going to

the radar where he saw the DUKE on his starboard bow and then in going back to the wing of the bridge to gaze into the darkness again, all before stopping his engines (Pet. Appendix, p. 5).

The Court of Appeals similarly found specifically that the whistle was heard off the starboard bow at "about 0414" and that the engines were stopped "around 0415" (Pet. Appendix, p. 15). This can hardly be characterized as "a matter of seconds". As set forth in more detail in our Petition (pp. 42-45), a comparable delay of one minute was held inexcusable by the Second Circuit in *Johnston-Warren Lines* v. *United States*, 196 F.2d 689 (1952) and by the Ninth Circuit in *The Silver Palm*, 94 F.2d 754, 761 (1938). Unless this Court reviews this decision, the lower courts will be hopelessly confused with respect to the proper interpretation of one of the most important provisions of the International Regulations for Preventing Collisions at Sea.

Respectfully submitted,

DEAN ACHESON
701 Union Trust Building
Washington, D. C.
EDWIN LONGCOPE
120 Broadway
New York 5, New York
Attorneys for Petitioner

COVINGTON & BURLING
HILL, BETTS & NASH
Of Counsel

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